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IN THE
COURT OF APPEALS OF INDIANA

TERRY W. HELSLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A05-0712-CR-722
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0612-FB-216

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Terry Helsley appeals his sentence for robbery as a class B felony.[1] Helsley raises one issue, which we revise and restate as whether the trial court abused its discretion in sentencing Helsley. We affirm.[2]

The relevant facts follow.[3] On December 20, 2006, Helsley, who was armed with a gun, and his brother entered the Swap Shop in Boonville. Helsley ordered Joyce Mason, the owner of the Swap Shop, and her father to get on the floor while holding a

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[1] Ind. Code § 35-42-5-1 (2004).

[2] Helsley included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 146-153. We remind Helsley that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

[3] Helsley did not request a transcript for the guilty plea hearing. However, the trial court entered an order stating that Helsley admitted that he had reviewed the charging information and probable cause affidavit, and the facts, statements, and information contained therein were true.

gun to their heads.[4] Helsley's brother jumped over the counter and took several handguns out of the store's cases. Helsley and his brother left traveling north but were later involved in an accident and were apprehended.

On December 22, 2006, the State charged Helsley with: Count I, armed robbery as a class B felony; Count II, conspiracy to commit armed robbery as a class B felony;[5] Count III, receiving stolen property as a class D felony;[6] and Count IV, resisting law enforcement as a class D felony.[7] On August 6, 2007, Helsley pleaded guilty to Count I, and the State dismissed the remaining counts.

The trial court found the following aggravators: (1) Helsley put the gun to the victims' heads and made them lie down on the floor; and (2) Helsley committed another offense while out on bond. The trial court did not find Helsley's upbringing, youth, and cooperation with law enforcement to be significant mitigators.[8] The trial court sentenced Helsley to twelve years in the Indiana Department of Correction.

The sole issue is whether the trial court abused its discretion in sentencing Helsley. We note that Helsley's offense was committed after the April 25, 2005, revisions of the

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[4] Helsley concedes that he held a gun to the victims' heads. See Appellant's Brief at 5.

[5] Ind. Code § 35-42-5-1, 35-41-5-2 (2004).

[6] Ind. Code § 35-43-4-2 (2004).

[7] Ind. Code § 35-44-3-3 (Supp. 2006).

[8] The trial court stated "I don't consider those mitigators, if you will, to be all that significant. At least I don't choose to give them hardly any weight." Transcript at 46.

sentencing scheme.[9] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

[9] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005).

Helsley argues that the trial court improperly used his actions as an aggravator because they were material elements of the offense. Specifically, Helsley argues that the fact that he was armed with a gun satisfies the element of a deadly weapon and the fact that he ordered Mason and her father to the floor "while holding a gun to their heads, satisfies the elements of 'using or threatening the use of force' and putting any person in fear.'" Appellant's Brief at 5.

A material element of a crime may not be used as an aggravating factor to support an enhanced sentence.[10] McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). However, when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. Id. The trial court must then detail why the defendant deserves an enhanced sentence under the particular circumstances. Id.

Here, the trial court stated:

> A robbery is done when you've got the gun and you walk into the store and point it at someone or threaten to use it. But, in this case, it was even more egregious than that. You put it to their heads, and then you had them lie down on the floor. When you make somebody lie down on the floor during

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[10] Ind. Code § 35-42-5-1, which governs the offense of robbery, provides:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
>
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear;
>
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon . . . .

> a robbery, that makes them totally defenseless. And what would you feel if that were to occur to you when you're lying there on the floor? It doesn't take that to commit a robbery. Those are extra circumstances above and beyond what the legislature considered when it passed the robbery statute and what it takes to actually commit the crime. You went above that.
>
> * * * * *
>
> I think the weight goes in this case to the fact that you did commit this crime, the fact that you did take steps that were over and above what was necessary to commit the crime.

Transcript at 44-46. We conclude that the trial court considered the facts that Helsley put the gun to the victims' heads and ordered them to lie on the floor not as a material element of the crime but as the nature and circumstances of the offense. Consequently, the trial court did not abuse its discretion by considering the nature and circumstances as an aggravating factor.[11] See, e.g., Sipple v. State, 788 N.E.2d 473, 482 (Ind. Ct. App. 2003) (holding that the trial court's explanation was significantly more than the mere recitation of the elements of the offense, and adequately supported the finding of the aggravating circumstance); Armstrong v. State, 742 N.E.2d 972, 981 (Ind. Ct. App. 2001) (holding that the trial court's sentencing statement "makes clear that it was not the pointing or shooting of the handgun that was the aggravating circumstance but the

[11] Helsley cites Allen v. State, 722 N.E.2d 1246, 1257 (Ind. Ct. App. 2000), in which this court held that the trial court failed to articulate sufficient facts to support its finding that the defendant's role in the robberies justified consecutive sentences. Specifically, the court held, "Indeed, Allen brandished a handgun during the course of only one of the three armed robberies, and although his threats to the Ramada Inn employee may certainly be construed as menacing, we cannot conclude that his role was sufficiently 'aggressive and serious' beyond the material elements of the crime to warrant the imposition of consecutive sentences." 722 N.E.2d at 1257. Here, unlike in Allen, Helsley ordered the victims to get on the floor and actually held the gun to their heads.

manner in which those offenses were committed" and "[t]his was a proper use of the nature and circumstances of the crimes committed as an aggravating factor.").

For the foregoing reasons, we affirm Helsley's sentence for robbery as a class B felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur